NO. 14-18-00600-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

PHI VAN DO
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 2130699
From County Criminal Court at Law No. 10 of Harris County, Texas
Hon. Dan Spjut, Judge Presiding

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Phi Van Do was convicted by a jury of Driving While Intoxicated (DWI). This was Mr. Do's first DWI conviction. He had an alcohol concentration level of at least 0.15 at the time an analysis of his breath was performed. Accordingly, his conviction occurred under Section 49.04(d) of the Penal Code so the offense was a Class A misdemeanor. The Court (County Criminal Court at Law No. 10 of Harris County) assessed punishment at one year in the Harris County Jail and a $250 fine. The Court suspended the sentence of confinement and placed Mr. Do on community supervision for one year. Mr. Do now brings this appeal.

STATEMENT REGARDING ORAL ARGUMENT

The undersigned attorney requests oral argument. In this case, oral argument could well serve to clarify any or all of the five issues in the appeal.

Issue Number Three especially warrants oral argument. This issue concerns the manner in which Class A misdemeanor DWI cases under Section 49.04(d) of the Penal Code should be tried. As the facts of this case demonstrate, there seems to be different ideas as to the elements of the offense. Confusion also exists as to whether the offense is an offense separate and apart from regular Class B misdemeanor DWI. Oral argument would likely be beneficial to this Court in its attempt to decide this commonly-occurring issue. The bar could indeed benefit from this Court's clear guidance. Accordingly, oral argument is warranted.

ISSUES PRESENTED

Issue Number One

The Texas Constitution says "no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury." A constitutional exception exists "in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary." Here, Mr. Do was punished by both fine and imprisonment in the county jail. He was not indicted by a grand jury. Can he be held to answer for a criminal offense?

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An information may not be presented until an affidavit (*i.e.,* a complaint) has been made by a credible person charging the defendant with an offense. Here, the complaint was signed, but the signature consists only of the signer's initials. There is no showing as to exactly who signed the complaint, let alone whether the signer is a credible person. Was the complaint valid?

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Generally, DWI is a Class B misdemeanor. But DWI is a Class A misdemeanor if it is shown at trial that the defendant's alcohol concentration level was 0.15 or higher. Here, the question of whether Mr. Do's alcohol concentration level was 0.15 or higher was never submitted to the jury. Rather, the judge made such a finding during the trial's punishment phase. Did the court err in convicting Mr. Do of Class A misdemeanor DWI?

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Generally, *Apprendi v. New Jersey* requires that any fact serving to increase a criminal penalty be found by a jury. Suppose a heightened alcohol concentration level (0.15 or more) is not an element of Class A misdemeanor DWI under Penal Code, Section 49.04(d). Suppose it is a punishment enhancement making regular Class B misdemeanor DWI punishable as a Class A misdemeanor. Under *Apprendi,* must the jury determine whether there is a heightened alcohol concentration level?

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In determining conditions of community supervision, a judge shall consider the extent to which the conditions impact the defendant's ability to meet financial obligations. Here, the trial judge imposed several financial obligations on Mr. Do as conditions of community supervision. Nothing in the record shows the trial judge considered Mr. Do's ability to pay these obligations. Is Mr. Do obligated to pay these financial assessments?

STATEMENT OF JURISDICTION

The Trial Court certified that the cause being appealed is not a plea bargain case and that Mr. Do has the right of appeal.[1] This certification is accurate. Generally, the defendant in a criminal action has the right of appeal.[2]

Additionally, a defendant must timely file a notice of appeal to give a court of appeals jurisdiction over an appeal.[3] A defendant's notice of appeal is timely if the notice is filed within thirty days after the day the sentence is imposed or suspended in open court.[4] In this case, a notice of appeal was timely filed. Sentence was imposed on June 19, 2018.[5] A notice of appeal was filed on July 13, 2018.[6] This was within thirty days of the date on which sentence was imposed. Accordingly, this Court of Appeals has jurisdiction to hear this appeal.

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[1] C.R. at 103.
[2] Tex. Code Crim. Proc. Ann. art. 44.02 (West 2006).
[3] *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996).
[4] Tex. R. App. P. 26.2(1)(A).
[5] C.R. at 94.
[6] C.R. at 107.

STATEMENT OF PROCEDURAL HISTORY

The judgment in this case was entered on June 19, 2018.[7] Notice of appeal was filed on July 13, 2013.[8] A motion for new trial was filed,[9] but no hearing on the motion was pursued. The judgment is now before this Court on appeal. The clerk's record was filed on October 15, 2018.[10] The reporter's record was filed on December 18, 2018.[11]

Generally, an appellant's brief must be filed within 30 days after the later of the filing of the clerk's record or the reporter's record.[12] In this case, the reporter's record was filed after the clerk's record. Accordingly, the appellant's brief in this case was due to be filed by the 30th day after December 18, 2018 which was January 17, 2019.

On January 14, 2018, undersigned counsel filed a motion for an extension of time to file the brief in this case. This Court granted that motion the same day and set a new due date of February 19, 2019 for the filing of the brief.

This brief was timely filed on February 11, 2019.

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[7] C.R. at 94.
[8] C.R. at 107.
[9] C.R. at 106.
[10] C.R. at 1.
[11] 1 R.R. at 1; 2 R.R. at 1; 3 R.R. at 1; 4 R.R at 1; 5 R.R. at 1.
[12] Tex. R. App. P. 38.6(a).

STATEMENT OF FACTS

Appellant, Phi Van Do, was involved in a minor car accident.[13] Police arrived on the scene and ended up transporting Mr. Do to the Houston Police Department's Central Intoxilyzer station for further investigation.[14] Mr. Do performed certain standard field sobriety tests.[15] He also submitted to a "breathalyzer" test.[16] Mr. Do's breath test revealed that his alcohol concentration level was 0.194.[17] A second breath test conducted at roughly the same time showed his alcohol concentration level to be 0.205.[18]

Mr. Do was charged via an information with Driving While Intoxicated (DWI).[19] The substantive portion of the information reads as follows:

> Comes now the undersigned district attorney of Harris County, Texas on behalf of the State of Texas and presents in and to the County Criminal Court at Law No._____ of Harris County, Texas, that in Harris County, Texas, **PHI VAN DO**, hereafter styled the defendant, heretofore on or about **JANUARY 9, 2017**, did then and there unlawfully operate a motor vehicle in a public place while intoxicated.
>
> It is further alleged that, at [sic] an analysis of a specimen of the defendant's BREATH showed an alcohol concentration level of at least 0.15 at the time the analysis was performed.[20]

[13] 2 R.R. at 94-95, 105-08, 164.
[14] 2 R.R. at 135, 149.
[15] 2 R.R. at 167-68.
[16] 2 R.R. at 167; 3 R.R. at 28.
[17] 3 R.R. at 62; 5 R.R. at State's Exhibit 5.
[18] 3 R.R. at 62; 5 R.R. at State's Exhibit 5.
[19] C.R. at 8.
[20] *Id.*

Mr. Do pleaded not guilty.[21] He exercised his right to have a jury decide the question of his guilt.[22] But he chose to have the trial court assess punishment if he were to be found guilty.[23] The trial judge explained Mr. Do's decisions in regard to jury involvement in his case to the venire panel as follows:

> In Texas we have what's called a bifurcated trial process, which means it's a two-part trial. The first phase is the guilt or innocence phase, which the six of you chosen today will rule upon and should the defendant be found guilty, then we would proceed to the second phase of the trial which is the punishment phase and the defendant has the right to go to the jury or to the Court for punishment and in this case the defendant has elected to go to the Court for punishment. So the six of you chosen today will only rule on guilt or innocence.[24]

After the six petit jurors were selected, trial began with the prosecutor reading the information to the jury.[25] The prosecutor read only the first paragraph of the substantive portion of the information as set out above.[26] The prosecutor did not read the second paragraph of the information to the jury.[27] That paragraph, of course, contained the allegation that Mr. Do's alcohol concentration level was at least 0.15.[28]

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[21] C.R. at 85, 94; 2 R.R. at 83-84.
[22] C.R. at 94; 2 R.R. at 31.
[23] C.R. at 94; 2 R.R. at 31.
[24] 3 R.R. at 31.
[25] 3 R.R. at 83.
[26] *See id.* *See also* text accompanying Footnote 20.
[27] *See* 3 R.R. at 83.
[28] *See* text accompanying Footnote 20.

The trial the proceeded in the usual manner.[29] Upon the conclusion of the presentation of the evidence, the trial judge read the charge to the jury.[30] The jury was charged as follows:

> You must determine whether the State has proved three elements beyond a reasonable doubt which are as follows:
>
> 1. The defendant, PHI VAN DO, operated a motor vehicle in Harris County, Texas, on or about JANUARY 9th, 2017;
>
> 2. in a public place;
>
> 3. while intoxicated by not having the normal use of his mental faculties due to the introduction of alcohol; by not having the normal use of his physical faculties due to the introduction of alcohol; or by having a [sic] alcohol concentration of .08 or higher.
>
> You must all agree on elements 1, 2, and 3 listed above but you do not have to agree on the method of intoxication listed above.
> If you all agree the State has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant "not guilty."
>
> If you all agree the State has proved, beyond a reasonable doubt, each of the three elements listed above then you must find the defendant guilty.[31]

On the verdict form, the jury was asked only to find whether or not Mr. Do was guilty of driving while intoxicated.[32] The jury was not asked to determine whether Mr.

[29] *See* 2 R.R. at 83-180; 3 R.R. at 5-76.
[30] 3 R.R. at 77; *see also* C.R. at 86-92.
[31] C.R. at 90-91.
[32] C.R. at 93.

Do had an alcohol concentration level of 0.15 or more.[33] The jury found Mr. Do guilty.[34] The jury was then dismissed.[35]

Four days later, the trial court conducted a punishment hearing in the case.[36] The hearing was conducted before the trial judge.[37] The following interaction occurred between the trial judge, the prosecutor (Mr. Cleggett) and the defense attorney (Mr. Hopmann):

> THE COURT: All right. We're here for sentencing. A jury trial was conducted in this court which began on June 14, 2018 and concluded on June 15th, 2018 at which time the jury returned a verdict of guilty. So, we're here for a sentencing. Anything from the State?
>
> MR. CLEGGETT: At this time, the State would like to allege – further allege the .15 allegation. So it is fair to allege that an analysis of a specimen of the defendant's breath showed an alcohol concentration level of at least 0.15 at the time the analysis was performed.
>
> THE COURT: Any objection from the defense?
>
> MR. HOPMANN: Your Honor, that element was not presented to the jury for their consideration as part of deliberations. We would object to the enhanced element at this time. They tried it as a loss of use case.
>
> THE COURT: Any response?
>
> MR CLEGGETT: The response from the State is that it's a punishment element. It wasn't a [sic] element of the actual offense. We did have evidence that the analysis of the breath was above a .15. We tried it as –

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[33] *See* C.R. at 93.
[34] C.R. at 93, 94; 3 R.R. at 90-91.
[35] *Id.*
[36] The guilt/innocence portion of the trial was conducted on June 14th and 15th of 2018. *See* 1 R R at 3-4. The punishment hearing was conducted on June 19th of the same year. *See* 1 R.R. at 5.
[37] 4 R.R. at 4-7.

> all three were able to prove intoxication and the BAC actually came out at trial.
>
> THE COURT: The objection is overruled. The Court finds the enhancement to be true.[38]

The trial court sentenced Mr. Do to serve one year in the Harris County Jail.[39] But the judge suspended execution of the sentence and placed Mr. Do on community supervision for a period of 12 months.[40] The judge also assessed a fine of $250.[41]

[38] 4 R.R. at 4-5.
[39] 4 R.R. at 6.
[40] *Id.*
[41] *Id.*

SUMMARY OF THE ARGUMENT

Appellant, Phi Van Do, advances five separate issues in this appeal.

In his first issue, Mr. Do argues that should not have been held to answer for the alleged offense of Driving While Intoxicated (DWI). Mr. Do bases his argument on Article I, Section 10 of the Texas Constitution. This provision says that "no person shall be held to answer for a criminal offense, unless on indictment of a grand jury." The provision also creates an exception to the grand jury requirement. The exception is "in cases in which the punishment is by fine or imprisonment other than in the penitentiary."

Here, Mr. Do was not indicted by a grand jury. He contends that he had to be indicted by a grand jury. Mr. Do reasons that the general rule requiring a grand jury indictment applies because the exception does not apply. Mr. Do argues that the exception is inapplicable because he was punished by both a fine and imprisonment.

Mr. Do therefore asserts that this Court should dismiss the prosecution against him because there was no valid charging instrument in his case. He contends that he could only have been charged by an indictment presented by a grand jury. If this Court accepts Mr. Do's argument, then none of the other four issues advanced by Mr. Do in this appeal require consideration.

In his second issue, Mr. Do challenges the validity of the information (*i.e.,* the charging instrument) in his case. The Code of Criminal Procedure says an information may not be presented until an affidavit (*i.e.,* a complaint) is made by a credible person.[42] Here, the complaint was signed, but the signature consisted only of the signer's initials. The record does not show exactly who signed the complaint, let alone whether the signer is a credible person. Therefore, the information was invalid. Because the information was invalid, the trial court never obtained jurisdiction over Mr. Do's case. Mr. Do requests that this Court rule in his favor on Issue Two and dismiss the prosecution against him. If this Court agrees with Issue Two, there will be no need for the Court to address Issues Three, Four, and Five.

In his third issue, Mr. Do contends that the trial court erred by treating an element of Class A misdemeanor DWI as a punishment enhancement. The offense of Driving While Intoxicated (DWI) is a Class B misdemeanor. But DWI is a Class A misdemeanor if it is shown at trial that the defendant's alcohol concentration level was 0.15 or higher. This Court has held that this heightened alcohol concentration level is an element of the offense of Class A misdemeanor DWI. It is not merely a fact serving to increase the punishment for a regular DWI.

[42] The affidavit must charge the defendant with an offense.

In this case, a jury determined that Mr. Do committed the offense of DWI. But the jury was never asked to determine whether Mr. Do had a heightened alcohol concentration level of 0.15 or higher. Instead, the trial judge found Mr. Do had a heightened alcohol concentration level during the punishment phase of trial. (Mr. Do had chosen to have the judge – not the jury – assess his punishment.) Thus, not every element of Class A misdemeanor DWI was proved during the guilt/innocence stage of trial.

Mr. Do was convicted of Class A misdemeanor DWI. But the jury was never even asked to find one of the elements of that crime. The jury was never asked to determine whether Mr. Do had an alcohol concentration level of 0.15 or more. Accordingly, the evidence is insufficient to support Mr. Do's conviction for Class A misdemeanor DWI.

The evidence is, however, sufficient to support a conviction for Class B misdemeanor DWI. Mr. Do requests that this Court reverse his judgment of conviction for Class A misdemeanor DWI. This Court should then remand the case to the trial court with instructions to reform the judgment to reflect a conviction for the offense of regular Class B misdemeanor DWI under Section 49.04(a).

The trial court should also be instructed to hold a new punishment hearing. This is because Mr. Do was punished for a Class A misdemeanor when he should only have

been punished for a Class B misdemeanor. The punishment for a Class A misdemeanor can include a jail sentence of up to one year. And indeed, in this case, the trial court assessed a one-year jail sentence against Mr. Do. But the maximum jail sentence for a Class B misdemeanor is only 180 days. Thus, Mr. Do is entitled to a new punishment hearing for conviction of a Class B misdemeanor with a maximum jail sentence of 180 days.

If this Court should grant Mr. Do relief in connection with Issue Three, there is no need to address Issue Four. But Issue Five should still be addressed.

In his fourth issue, Mr. Do argues that the trial court's determination that he had a heightened alcohol concentration level violated *Apprendi v. New Jersey*. In *Apprendi,* the United States Supreme Court held that any fact serving to increase a criminal penalty must be found by a jury. That did not happen in this case. The fact that Mr. Do had a heightened alcohol concentration level was not found by a jury. Rather, the trial judge found this fact. And the finding of this fact increased the range of punishment Mr. Do faced. Instead of facing a maximum term of confinement in jail of 180 days, Mr. Do faced a maximum term of one year. And indeed, Mr. Do was given a one-year jail sentence.

This issue is advanced just in case this Court does not agree with Mr. Do in regard to Issue Three. If this Court grants Mr. Do relief in regard to Issue Three, then

this issue need not be reached. But if this Court reaches and grants this issue, the appropriate relief is the relief suggested in connection with Issue Three above.

In his fifth issue, Mr. Do argues that the trial court failed to make a statutorily-required ability-to-pay determination at sentencing. The trial court assessed a fine, court costs, and various fees associated with community supervision against Mr. Do. But this assessment was made without conducting any inquiry into whether Mr. Do was financially able to make such payments. It is an absolute requirement that such an inquiry be made before assessing fines and fees. Mr. Do requests that this Court find the trial court's failure to conduct the ability-to-pay inquiry to be error. The case should be remanded to the trial court so the judge may perform the required ability-to-pay inquiry.

This issue should be considered by this Court only if both Issue One and Issue Two are rejected. This issue should be considered regardless of how this Court rules on Issues Three and Four.

ARGUMENT

Issue Number One

The Texas Constitution says "no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury." A constitutional exception exists "in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary." Here, Mr. Do was punished by both fine and imprisonment in the county jail. He was not indicted by a grand jury. Can he be held to answer for a criminal offense?

Article I, Section 10 of the Texas Constitution is entitled "Rights of Accused in Criminal Prosecutions." The constitutional provision is part of the Texas Bill of Rights.[43] In pertinent part, the provision reads as follows:

> [A]nd no person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.[44]

As can be seen, the provision sets out a general rule. The rule says no person shall be held to answer for a criminal offense unless he or she has been indicted by a grand jury. As can also be seen, there are three exceptions to the general rule:

(1) cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary;
(2) cases of impeachment; and
(3) cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

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[43] Article I of the Texas Constitution is known as the Texas Bill of Rights. Section 29 says:

> **Provisions Of Bill Of Rights Excepted From Powers Of Government; To Forever Remain Inviolate.** To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws to the contrary thereto, or to the following provisions, shall be void.

[44] Tex. Const. art. I, § 10 (emphasis added).

Clearly, the second and third exceptions do not apply in the case at bar. The case does not involve impeachment. Nor does the case arise in the army, navy, or militia. The only possible exception is the first exception.

Again, the precise language of the first exception is as follows:

> cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary.[45]

The first exception speaks of cases involving one of two kinds of punishment. The first kind of punishment is a "fine." The second kind of punishment is "imprisonment, other than in the penitentiary." Imprisonment (or "confinement") other than in the penitentiary would certainly include imprisonment in a county jail.

In the current case, Mr. Do was charged via an information[46] with a Class A misdemeanor under Section 49.04(d) of the Penal Code. Class A misdemeanors "shall be punished by: (1) a fine not to exceed $4,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and confinement."[47] Consistent with the punishment permitted by statute, Mr. Do was punished with both a fine ($250) and confinement in the county jail (one year).[48] Clearly, if Mr. Do had been punished with

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[45] *Id.*
[46] The charging instrument was an information; there was no grand jury indictment.
[47] Tex. Penal Code § 12.21.
[48] C.R. at 94; 4 R.R. at 6. The trial court suspended Mr. Do's sentence of confinement and placed him on community supervision for one year. Thus, Mr. Do's punishment was not "carried into execution." *See* Tex. Code Crim. Proc. art. 42.02. But part of his punishment was confinement in jail.

only the fine, a grand jury indictment would not have been necessary. Just as clearly, if Mr. Do had been punished with only the year of confinement in jail, an indictment would not have been necessary. But in this case, both punishments were assessed. In a situation like this in which both punishments are assessed, a grand jury indictment is necessary. In fact, in all Class A misdemeanor cases an indictment is necessary because both punishment by fine and punishment by confinement in jail are possible.[49] In the absence of an indictment, Mr. Do should never have been held to answer for the criminal offense of which he was convicted.

There is Court of Criminal Appeals precedent contrary to Mr. Do's argument. In 1947, the Court rejected Mr. Do's exact argument in *Peterson v. State.*[50] The Court set out the entirety of its reasoning in a single paragraph:

> There have been many attacks made on proceedings because not in compliance with this section of the Constitution [Article I, Section 10], but this, to the writer, is the first one in which we find this particular question raised. Thousands of cases have come to this Court in which convictions were had for aggravated assault and battery.[51] Usually they were charged by complaint and information. All courts have acted upon the assumption this was proper. We think they have been right and [we]

[49] The same can be said about all Class B misdemeanor cases. *See* Tex. Penal Code art. 12.22 (punishment for Class B misdemeanor can consist of both a fine and confinement in jail).

[50] *Peterson v. State,* 204 S.W.2d 618, 618 (Tex. Crim. App. 1947) (Appellant argued that because both a fine and imprisonment in jail could be assessed as punishment, he could be charged only by indictment of a grand jury).

[51] The aggravated assault charge against Mr. Peterson was apparently a misdemeanor. Conviction was had in a county court at law in Harris County and the sentence of confinement was six months in jail. *Id.*

> are, therefore, unable to give effect to the distinction which appellant seeks to make."[52]

The Court's reasoning seemed to be based on the idea that things have always been done this way.[53] There was no analysis of what Article I, Section 10 actually says.[54] What Mr. Do seeks here is an actual analysis of the constitutional provision in question. The literal wording of our Constitution – and especially the literal wording of our Bill of Rights – cannot simply be ignored.[55]

Obviously, Mr. Do's argument is that Article I, Section 10 uses the term "or." Thus, the absence of a grand jury indictment is permissible only when punishment is either a fine or confinement in jail. The word "or" is not the same as the word "and." As the Texas Supreme Court said just three years prior to the *Peterson* decision:

> Ordinarily, the words "and" and "or," are in no sense interchangeable terms, but, on the contrary, are used in the structure of language for purposes entirely variant, the former being strictly of a conjunctive, the latter, of a disjunctive, nature. Nevertheless, in order to effectuate the intention of the parties to an instrument, a testator, or a legislature, as the case may be, the word "and" is sometimes construed to mean "or." This construction, however, is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion; as where it must be done in order to effectuate the manifest intention of the user; and where not to do so would render the meaning

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[52] *Id.*
[53] *Id.* ("All courts have acted upon the assumption this was proper.").
[54] Even though the *Peterson* opinion has existed for over 70 years, no appellate court has ever cited it. There appears to have never been any real analysis of this provision of our Constitution.
[55] *See* Footnote 43.

> ambiguous, or result in an absurdity; or would be tantamount to a refusal to correct a mistake.[56]

So ordinarily "or" means "or" while "and" means "and." The Supreme Court said sometimes the word "and" can mean "or." But the Supreme Court did not say the word "or" can ever mean "and."

In *Peterson*, the Court of Criminal Appeals effectively substituted the word "and" for the word "or." "[O]rdinarily the words 'and' and 'or' are in no sense interchangeable terms."[57] The *Peterson* Court offered absolutely no explanation as to why the word "or" should mean "and" in Article I, Section 10. The fact that treating the word "or" to actually mean "or" would lead to unfortunate results is not a valid basis for the Court's decision.

The constitutional requirement of an indictment is a fundamental systemic requirement.[58] Thus, the right is "so important that [its] implementation is mandatory."[59] The right cannot be waived.[60] In fact, the requirement of a grand jury requirement is not even stated in terms of being a right. Rather, the Constitution affirmatively states that "no person shall be held to answer for a criminal offense, unless

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[56] *Bd. of Ins. Commr's v. Guardian Life Insurance Co. of Texas,* 180 S.W.2d 906, 908 (Tex. 1944).
[57] *Id.*
[58] *Cook v. State,* 902 S.W.2d 471, 475 n.1 (Tex. Crim. App. 1995) (citing *Marin v. State,* 851 S.W.2d 275, 280 (Tex. Crim. App. 1993).
[59] *Marin v. State,* 851 S.W.2d at 280.
[60] *Id.*

on indictment of a grand jury."[61] Mr. Do should not be held to answer for the criminal offense with which he was charged. He was punished with both a fine and confinement in the county jail. The express terms of Article I, Section 10 require that he be charged by indictment. The fact that back in 1947 courts had long assumed an indictment was unnecessary does not render the actual language of our Constitution meaningless.

"[T]he most relevant consideration in construing a constitutional . . . provision is its text."[62] In construing the Texas Constitution, appellate courts are to "ascertain and give effect to the plain intent and language of the framers . . . ."[63] The Texas Supreme Court has said:

> We presume the language of the Constitution was carefully selected, interpret words as they are generally understood, and rely heavily on the literal text.[64]

The Texas Court of Criminal Appeals has said much the same thing:

> In interpreting statutes, it is the practice of this court to concentrate on the literal text of a statute in order to ascertain its meaning. It is only when the literal text is unclear or would lead to absurd results that we would utilize additional means to reach the statutory intent. *Hernandez v. State,* 861 S.W.2d 908, 909 (Tex.Cr.App. 1993); *Boykin v. State,* 818 S.W.2d 782, 785 (Tex.Cr.App. 1991). This Court should be guided by the same principle when interpreting constitutional provisions.[65]

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[61] Tex. Const. art. I, § 10. There are, of course, exceptions as pointed out earlier.
[62] *In re Allcat Claims Service, L.P.,* 356 S.W.3d 455, 466-67 (Tex. 2011) (orig. proceeding).
[63] *Id.* at 466.
[64] *Id.* (emphasis added).
[65] *Stine v. State,* 908 S.W.2d 429, 431(Tex. Crim. App. 1995).

Over a century ago, in the case of *Keller v. State*, our Court of Criminal Appeals said:

> Where words, terms, or language of the Constitution are plain and definite, there is no room for construction, for such language is self-construing, and to be taken in its ordinary meaning and acceptance at the time of the adoption of the Constitution. If this were not true, the Legislature could carve or legislate away the plainest provisions of that instrument, or these provisions could be construed to mean anything to suit the passing fancy of the hour, or as clamor might demand. Above all, there remains this fundamental rule: That, wherever the purpose and intent of the framers of the Constitution is clearly expressed, it will be followed by the courts in construing that instrument.[66]

The Court continued in the same case, saying:

> That inconvenience may and will arise from an adherence to the Constitution may be conceded, but this affords no reason for construing away its provisions. It is not for the courts or Legislatures to supply these defects. This is for the people who made that instrument.[67]

One more quotation from *Keller* is appropriate:

> If the people want a change in the Constitution, there is a method provided in that instrument by which it can be accomplished. It cannot be done by the Legislature, nor by the courts. Whatever decision the court may render, or whatever act the Legislature may pass, contrary to the Constitution, is not and cannot be the law, and no attempt ought to be made thus to override the provisions of that instrument.[68]

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[66] *Keller v. State,* 87 S.W. 669, 676 (Tex. Crim. App. 1905).
[67] *Id.*
[68] *Id.* at 677.

This Court may feel compelled to reject Mr. Do's argument because of the *Peterson* case. This is understandable. But the overruling of this issue by an intermediate court of appeals is necessary to request consideration of this argument by the Court of Criminal Appeals. And Mr. Do fully intends to advance this issue to the Court of Criminal Appeals so that that Court may reconsider its 1947 opinion. Thus, Mr. Do respectfully asks this Court for a ruling on this important issue of constitutional interpretation.

Specifically, Mr. Do asks this Court to rule in his favor on Issue One, reverse the trial court's judgment, and dismiss the prosecution against him. This is because he should not be held to answer an information; the Texas Constitution requires that he be charged by indictment.

Issue Number Two

An information may not be presented until an affidavit (*i.e.,* a complaint) has been made by a credible person charging the defendant with an offense. Here, the complaint was signed, but the signature consists only of the signer's initials. There is no showing as to exactly who signed the complaint, let alone whether the signer is a credible person. Was the complaint valid?

Article 21.22 of the Code of Criminal Procedure states that

> No information may be presented until affidavit has been made by some credible person charging the defendant with an offense.[69]

The affidavit referred to above is commonly known as a "complaint."

In the current case, there is a signed complaint.[70] However, there is no indication in the complaint (or in any other part of the record) as to exactly who signed the complaint. All that can be gleaned from the signature is that the signer's initials are A.H. The complaint does not reveal who the signer is – let alone if the signer is a "credible" person as the statute mandates.[71]

The Court of Criminal Appeals has held that the complaint itself need not allege that the affiant is a credible person.[72] But there still exists a requirement that the

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[69] Tex. Code Crim. Proc. Ann. art. 21.22.

[70] C.R. at 7.

[71] "A 'credible person' is defined to be a person who is competent to testify, and who is worthy of belief." *Ashley v. State,* 237 S.W.2d 311, 313 (Tex. Crim. App. 1951).

[72] *See Woods v. State,* 499 S.W.2d 328, 329 (Tex. Crim. App. 1973); *Ashley v. State,* 237 S.W.2d at 313; *Dodson v. State,* 34 S.W. 754 (Tex. Crim. App. 1896) (allegation that affiant is a credible person is "not an essential element in the affidavit").

complaint be made by a credible person.[73] The wording of a statute cannot simply be ignored.

Based solely on the wording of Article 21.22, Mr. Do makes the following argument. Because there is no evidence the complaint was signed by a credible person, the information should never have been presented.[74] The presentment of the information was erroneous. And it is the presentation of the information that gives the trial court jurisdiction of the case.[75] "The presentment of an indictment or information to a court invests the court with jurisdiction of the cause."[76] Thus, because presentation of the information to the court was erroneous, the trial court never obtained jurisdiction of the case. Consequently, the judgment of conviction is void.[77] And an attack on the ground that a judgment is void can be raised at any time.[78]

Undersigned counsel is aware that case law undercuts the foregoing argument. In *Woods v. State,* the Court of Criminal Appeals addressed contentions that a complaint was invalid because it was not signed by a credible person.[79] The Court said such a defect in the complaint was a "latent defect" that "required the introduction of proof

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[73] *Woods v. State,* 499 S.W.2d at 329; *Ashley v. State,* 237 S.W.2d at 313; *Dodson v. State,* 34 S.W. at 754.
[74] *See Ashley v. State,* 237 S.W.2d at 313 ("A valid complaint is requisite to a valid information.").
[75] *See* Tex. Const. art. V, § 12(b).
[76] *Id.*
[77] *Gallagher v. State,* 690 S.W.2d 587, 589 n. 1 (Tex. Crim. App. 1985) ("judgment which court is without jurisdiction to render is void").
[78] *Levy v. State,* 818 S.W.2d 801, 802 (Tex. Crim. App. 1991).
[79] *Woods v. State,* 499 S.W.2d at 329.

to establish the same."[80] Because no such proof was introduced in the trial court, the Court overruled the appellant's ground of error which had claimed the complaint was invalid."[81]

In the current case, no objection was raised to the complaint. Thus, the *Woods* case would appear to defeat any argument on appeal that the complaint was defective (thereby rendering the information defective). The more modern Court of Criminal Appeals case of *Ramirez v. State*[82] would seem to shut the door on this argument even more tightly. In R*amirez,* the Court of Criminal Appeals made the following declaration:

> As amended in 1985, Article 5, section 12(b) of the Texas Constitution provides, in part, that the presentment of an indictment or information vests the trial court with jurisdiction of the cause. Tex. Const. art. V, § 12(b). However, this constitutional provision does not apply to complaints. *Huynh v. State*, 901 S.W.2d 480, 481 (Tex.Crim.App.1995).
>
> Now, under the explicit terms of the Constitution itself, the mere presentment of an information to a trial court invests that court with jurisdiction over the person of the defendant, regardless of any defect that might exist in the underlying complaint. *Aguilar* [*v. State*], 846 S.W.2d [318,] 320 [(Tex. Crim. App. 1993)]. Defects in complaints are no longer jurisdictional in the traditional sense. *Ibid.*[83]

The flaw in this declaration is that the statute instructs us that

> no information shall be presented until affidavit has been made by some credible person charging the defendant with an offense.[84]

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[80] *Id.*
[81] *Id.*
[82] *Ramirez v. State,* 105 S.W.3d 628 (Tex. Crim. App. 2003).
[83] *Ramirez v. State,* 105 S.W.3d at 629.
[84] *See* Tex. Code Crim. Proc. Ann. art. 21.22 (West 2009).

And as stated in Article V, Section 12 of the Texas Constitution,

> the practice and procedures relating to the use of indictments and informations, including their contents, amendments, sufficiency, and requisites, are as provided by law.[85]

As the underlined portion of the foregoing constitutional provision shows, the requisites of an information "are as provided by law."[86] This constitutional provision effectively incorporates the statutory practices and procedures relating to the requisites of informations into our Constitution. One of these requisites is that an information is not to be presented until a complaint has been made by some credible person.[87] Thus, it is constitutionally required that an information not be presented until a complaint has been made by a credible person. To allow an information to be presented before a complaint has been made by a credible person is to effectively ignore a constitutional requirement of informations. It is illogical to say the presentation of an indictment gives a court jurisdiction when a constitutional provision prevents such presentment in the first place.

In light of the foregoing arguments, Mr. Do requests that this Court sustain this second issue, reverse the judgment of conviction, and dismiss the prosecution against him.

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[85] Tex. Const. art. V, § 12(b) (emphasis added).
[86] *See id.*
[87] *See* Tex Code Crim. Proc. Ann. art. 21.22.

Issue Number Three

Generally, DWI is a Class B misdemeanor. But DWI is a Class A misdemeanor if it is shown at trial that the defendant's alcohol concentration level was 0.15 or higher. Here, the question of whether Mr. Do's alcohol concentration level was 0.15 or higher was never submitted to the jury. Rather, the judge made such a finding during the trial's punishment phase. Did the court err in convicting Mr. Do of Class A misdemeanor DWI?

The Law – An alcohol concentration level of 0.15 or higher is an element of the offense of Class A misdemeanor DWI. It is not merely a fact serving to enhance the punishment for a Class B misdemeanor DWI.

Section 49.04 of the Penal Code is entitled "Driving While Intoxicated." The full statute reads as follows:

> (a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.
>
> (b) Except as provided by Subsections (c) and (d) and Section 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.
>
> (c) If it is shown on the trial of an offense under this section that at the time of the offense the person operating the motor vehicle had an open container of alcohol in the person's immediate possession, the offense is a Class B misdemeanor, with a minimum term of confinement of six days.
>
> (d) If it is shown on the trial of an offense under this section that an analysis of a specimen of the person's blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed, the offense is a Class A misdemeanor.

In *Navarro v. State,* this Court specifically considered Subsection (d).[88] This Court pondered whether an alcohol concentration level of 0.15 or higher provides a basis for

[88] *Navarro v. State,* 469 S.W.3d 687, 696 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).

enhancement or is an element of a separate offense."[89] This Court held that an alcohol concentration level of 0.15 or higher is an element of an offense separate from Class B misdemeanor DWI.[90] Citing *Calton v. State,*[91] this Court said:

> A plain reading of that subsection reveals that its effect is to convert an offense from a Class B misdemeanor to a Class A misdemeanor whenever a person charged with driving while intoxicated is shown to have "an alcohol concentration level of 0.15 or more." Because this conversion represents a change in the degree of the offense, rather than just an enlargement of the punishment range for a Class B misdemeanor, we agree with the State that a person's alcohol concentration level is not a basis for enhancement. *See Calton*, 176 S.W.3d at 233 (an enhancement does not change the degree of the offense of conviction). It is instead an element of a separate offense because it represents a specific type of forbidden conduct – operating a motor vehicle while having an especially high concentration of alcohol in the body.[92]

Following *Navarro,* the Corpus Christi Court of Appeals reached the same conclusion in *Castellanos v. State*.[93] The Court said:

> [S]ubsection (d) elevates the degree of the offense from a class B misdemeanor to a class A misdemeanor, which is the hallmark of an element. *See Calton,* 176 S.W.3d at 233. We do not agree with the State that *Navarro* is incorrectly decided. Therefore, we hold, as did our sister court in *Navarro,* that subsection (d) describes an element of a class A misdemeanor DWI, <u>which the State has to prove at the guilt/innocence stage of a defendant's trial</u>.[94]

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[89] *Id.* at 696.
[90] *Id.*
[91] *Calton v. State,* 176 S.W.3d 231 (Tex. Crim. App. 2005).
[92] *Navarro v, State,* 469 S.W.3d at 696.
[93] *Castellanos v. State,* 533 S.W.3d 414, 418-19 (Tex. App.—Corpus Christi 2016, pet. ref'd).
[94] *Id.* (emphasis added).

Recently, this Court reiterated that an alcohol concentration level of 0.15 or more is an element of Class A misdemeanor DWI under Section 49.04(d).[95] In fact, in *Diamond v. State,* this Court referred to the 0.15-alcohol-concentration-level element as a "special issue" on which the factfinder makes an "affirmative finding."[96] And as noted in the *Castellanos* case, this special finding must be made at the guilt/innocence stage of a trial – not during the punishment stage.[97]

***The Facts* – Mr. Do's alcohol concentration level of 0.15 or higher was not treated as an element of Class A misdemeanor DWI. The jury was never charged with finding whether Mr. Do's alcohol concentration level was 0.15 or higher. Instead, the trial judge made this finding in the course of determining an appropriate punishment.**

The jury was not charged with finding whether Mr. Do's alcohol concentration level was 0.15 or higher.[98] This was the case even though the information alleged that Mr. Do had an alcohol concentration level of at least 0.15.[99] The written jury instructions did not mention the information's allegation that Mr. Do's alcohol concentration level was 0.15 or more.[100] Likewise, when the prosecutor read the

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[95] *See Diamond v. State,* 561 S.W.3d 288, 298 (Tex. App.—Houston [14th Dist.] 2018, pet. filed).
[96] *Id.*
[97] *See* text accompanying Footnote 94.
[98] C.R. at 86-93. Exactly the same thing occurred in the *Navarro* case. *See Navarro v. State,* 469 S.W.3d at 690-91 ("At the trial court level, the trial judge failed to submit a question to the jury as to whether appellant's blood alcohol level was at least 0.15 to support the Class A misdemeanor conviction.").
[99] C.R. at 8. Again, the current case parallels *Navarro.* In *Navarro,* the charging instrument alleged that the defendant's blood showed an alcohol concentration level of at least 0.15. *Navarro v. State,* 469 S.W.3d at 692.
[100] *See* C.R. at 86-92.

information to the jury at the trial's beginning, the allegation concerning Mr. Do's heightened alcohol concentration was not included.[101]

The jury found Mr. Do "**guilty** of driving while intoxicated as charged in the information."[102] The jury was never asked to consider whether Mr. Do's alcohol concentration level was 0.15 or higher.[103] Instead, the issue of Mr. Do's heightened alcohol concentration level was dealt with at the punishment hearing before the trial court. The following proceedings from the June 19, 2018 punishment hearing show this to be the case:

> THE COURT: All right. We're here for sentencing. A jury trial was conducted in this court which began on June 14, 2018 and concluded on June 15, 2018 at which time the jury returned a verdict of guilty. So, we're here for a sentencing. Anything from the State?
>
> MR. CLEGGETT: At this time, the State would like to allege – further allege the .15 allegation. So it is fair to allege that an analysis of a specimen of the defendant's breath showed an alcohol concentration level of at least 0.15 at the time the analysis was performed.
>
> THE COURT: Any objection from the defense?
>
> MR. HOPMANN: Your Honor, that element was not presented to the jury for their consideration as part of deliberations. We would object to the enhanced element at this time. They tried it as a loss of use case.
>
> THE COURT: Any response?
>
> MR. CLEGGETT: The response for the State is that it's a punishment element. It wasn't an element of the actual offense. We did have evidence

[101] 2 R.R. at 83.
[102] C.R. at 93-94; 3 R.R. at 90-91.
[103] C.R. at 86-93.

> that the analysis of the breath was above a .15. We tried it as – all three were able to prove intoxication and the BAC actually came out at trial.
>
> THE COURT: The objection is overruled. The Court finds the enhancement to be true.[104]

Clearly, the trial court treated the allegation of an alcohol concentration level of 0.15 or higher as a punishment enhancement. The trial court did not treat the heightened alcohol concentration level as an element of the primary offense.[105]

***Application of the Law to the Facts* – The jury did not determine whether Mr. Do's alcohol concentration level was 0.15 or higher. Thus, the jury did not find every element of the offense of Class A misdemeanor DWI. Mr. Do's conviction for Class A misdemeanor DWI cannot stand.**

Phi Van Do was convicted of Driving while Intoxicated (DWI) under Section 49.04(d) of the Texas Penal Code.[106] The offense is a Class A misdemeanor.[107] It is an entirely different offense than regular DWI.[108] Regular DWI is a Class B misdemeanor.[109] The Class A misdemeanor offense of DWI under Section 49.04(d) has an additional element that regular DWI does not have. That additional element is

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[104] 4 R.R. at 4-5.

[105] In other words, the trial court treated Mr. Do as though he had been convicted of a Class B misdemeanor. The trial court then considered an enhanced punishment range for the crime as if it were actually a Class A misdemeanor. But the written judgment reveals something entirely different. The judgment states that Mr. Do was convicted of a Class A misdemeanor. *See* C.R. at 94. The area on the written judgment in which punishment enhancements are to be recorded shows there to have been no enhancements. *See id.* So the judgment treats the case the way it should have been handled. Of course, the case was not handled in the manner the written judgment represents.

[106] C.R. at 94.

[107] Tex. Penal Code § 49.04(d).

[108] *See* text accompanying Footnote 92.

[109] Tex. Penal Code § 49.04 (a), (b).

that the defendant's alcohol-concentration level was 0.15 or more. And as announced in *Castellanos v. State,* this additional element must be proved at the guilt/innocence stage of trial.[110]

In the current case, the trial court did not treat this additional element as an element of the offense under Section 49.04(d). Thus, the jury was never asked to decide whether Mr. Do's alcohol concentration level was 0.15 or more. Instead, the trial court treated this element of the offense as a punishment-enhancement issue.[111] This was an error.

"[N]o person may be convicted of an offense unless each element of the offense is proven beyond a reasonable doubt."[112] Every element of the offense of Class A misdemeanor DWI under Section 49.04(d) was not proven in this case. The jury was the factfinder and was never even asked to consider the existence of a necessary element of the offense. Thus, the jury never found the existence of an element of the offense. Specifically, the jury never found that Mr. Do's alcohol-concentration level was 0.15 or higher. Accordingly, the evidence is legally insufficient to sustain Mr. Do's conviction under Section 49.04(d).

[110] *See* text accompanying Footnote 94.
[111] *See* text accompanying Footnote 104.
[112] Tex. Code Crim. Proc. art. 38.03.

<u>Remedy</u> – This Court should reverse the trial court's judgment and reform the judgment to reflect a conviction for the lesser-included offense of Class B misdemeanor DWI. Then this Court should remand the case to the trial court for a new punishment hearing.

As explained above, the evidence is insufficient to support Mr. Do's conviction for Class A misdemeanor DWI under Section 49.04(d) of the Penal Code. But the evidence <u>is</u> sufficient to support a lesser-included offense of regular DWI under Penal Code, Section 49.04(a).

The jury was charged with determining whether Mr. Do, while intoxicated, operated a vehicle in a public place.[113] In the course of convicting Mr. Do of Class A misdemeanor DWI, the jury necessarily found every element of regular Class B misdemeanor DWI. Therefore, regular Class B misdemeanor DWI is a lesser-included offense of Class A misdemeanor DWI.

The case of *Thornton v. State*[114] teaches us how a situation like this should be handled. In *Thornton,* the Court of Criminal Appeals found the evidence was insufficient to support the defendant's conviction.[115] But the Court found the evidence was sufficient to support a conviction for a lesser-included offense.[116] Consequently, the Court remanded the case to the trial court to reform the judgment to reflect a conviction

[113] C.R. at 90.
[114] *Thornton v. State,* 425 S.W.3d 289 (Tex. Crim. App. 2014).
[115] *Id.* at 299-300.
[116] *Id.*

for the lesser-included offense.[117] The Court also directed the trial court to hold a new punishment hearing.[118]

Mr. Do argues that the evidence is insufficient to support a conviction for Class A misdemeanor DWI under Section 49.04(d). But he does not contend the evidence is insufficient to support a conviction for the lesser-included offense of regular Class B misdemeanor DWI under Section 49.04(a). Accordingly, Mr. Do asks that this Court remand this case to the trial court. The trial court should be instructed to reform the judgment to reflect a conviction for the offense of regular Class B misdemeanor DWI under Section 49.04(a).[119]

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[117] *Id.* at 307. The Court of Criminal Appeals issued the following guidance for intermediate appellate courts in dealing with these types of situations:

> In summary, then, after a court of appeals has found the evidence insufficient to support an appellant's conviction for a greater-inclusive offense, in deciding whether to reform the judgment to reflect a conviction for a lesser-included offense, that court must answer two questions: 1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant of the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense? If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment. But if the answers to both are yes, the court is authorized—indeed required—to avoid the "unjust" result of an outright acquittal by reforming the judgment to reflect a conviction for a lesser-included offense.

Id. at 300 (emphasis added). The foregoing quotation speaks of the intermediate court of appeals reforming the judgment. But in *Thornton,* the Court of Criminal Appeals actually remanded the case to the trial court and directed the trial court to reform the judgment. *Id.* at 307 ("The cause is remanded to the trial court to reform the judgment to reflect a conviction for the offense of attempted tampering with evidence and to hold a punishment hearing attendant to this post-reformation conviction."). Mr. Do suggests that this Court take similar action.

[118] *Id.* at 307.

[119] *See* Footnote 117.

The trial court should also be instructed to hold a new punishment hearing. This is because Mr. Do was punished for a Class A misdemeanor when he should only have been punished for a Class B misdemeanor. The punishment for a Class A misdemeanor can include a jail sentence of up to one year.[120] And indeed, in this case, the trial court assessed a one-year jail sentence against Mr. Do.[121] But the maximum jail sentence for a Class B misdemeanor is only 180 days. Thus, Mr. Do is entitled to a new punishment hearing for conviction of a Class B misdemeanor with a maximum jail sentence of 180 days.[122]

[120] Tex. Penal Code § 12.21.

[121] C.R. at 94; 4 R.R. at 6. Mr. Do was placed in community supervision, but he was still assessed a one-year jail sentence. The placement of Mr. Do on community supervision simple served to suspend the execution of Mr. Do's one-year jail sentence.

[122] Mr. Do's request that the case be remanded to the trial court assumes that this Court has rejected Issues One and Two in this appeal. In fact, this Court should not reach this issue (Issue Three) if this Court grants relief on Issue One or Issue Two (or both).

Issue Number Four

Generally, *Apprendi v. New Jersey* requires that any fact serving to increase a criminal penalty be found by a jury. Suppose a heightened alcohol concentration level (0.15 or more) is not an element of Class A misdemeanor DWI under Penal Code, Section 49.04(d). Suppose it is a punishment enhancement making regular Class B misdemeanor DWI punishable as a Class A misdemeanor. Under *Apprendi,* must the jury determine whether there is a heightened alcohol concentration level?

In Issue Number Three, Mr. Do explains that an alcohol concentration level of 0.15 or more is an element of Class A misdemeanor DWI. It is not merely a fact serving to enhance the punishment for a Class B misdemeanor. Mr. Do cites cases from this Court showing this to be the case.[123] Mr. Do believes this Court will follow its own precedent and find a heightened alcohol concentration level is an element of Class A misdemeanor DWI. If this Court does so, then this issue (Issue Four) need not be addressed. But if, for some reason, this Court departs from its precedent, then Issue Four should be considered.

Nineteen years ago, the United States Supreme Court decided the landmark case of *Apprendi v. New Jersey.*[124] In *Butler v. State,* the Court of Criminal Appeals summarized *Apprendi* as follows:

> In *Apprendi,* the United States Supreme Court examined the validity of a hate-crime statute that allowed for an increased sentence if the trial judge determined, by a preponderance of the evidence, that the defendant committed the crime with the intent to intimidate a person or group of persons because of their race, color, gender, handicap, religion sexual

[123] *See* text accompanying Footnotes 90-92 and Footnotes 95-97.

[124] *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

> orientation, or ethnicity. The Court determined that the statute was unconstitutional and held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.[125]

Apprendi established a test for determining if a finding by the trial court (as opposed to the jury) is constitutionally permissible.[126] The test is phrased as a question, namely: "does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict.[127]

If a heightened alcohol concentration level is a punishment enhancement,[128] then the finding of a heightened alcohol concentration level should be made by the jury. This is what *Apprendi* teaches us. In this case, the judge made the finding during the punishment phase of trial.[129] The fact that the judge made this finding is problematic. The finding allowed Mr. Do to be punished for a Class A misdemeanor instead of a

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[125] *Butler v. State,* 189 S.W.3d 299, 302 (Tex. Crim. App. 2006) (internal footnote and citations omitted; emphasis added). The underlined language is the exact language used in *Apprendi. See Apprendi v. New Jersey,* 530 U.S. at 490. As the Supreme Court noted, the fact of a prior conviction is an exception to the general rule. Thus, this brief employs the word "generally" before saying *Apprendi* requires that any fact serving to increase a criminal penalty be found by a jury.

[126] The federal constitutional provisions at issue are the Sixth Amendment (right to a jury trial) and the Fourteenth Amendment (right to due process). *See Apprendi v. State,* 530 U.S. at 476-77.

[127] *Id.* at 494.

[128] Mr. Do is not claiming that a heightened alcohol concentration level is a punishment enhancement. Mr. Do asserts that a heightened alcohol concentration level is an element of Class A misdemeanor DWI under Penal Code, Section 49.04(d). *See* Issue Three of this brief. Mr. Do's argument in this issue (Issue Number Four) is an alternative argument. This argument is made in an abundance of caution just in case this Court finds a heightened alcohol concentration level to be a punishment enhancement.

[129] 4 R.R. at 5. The jury had been released after finding Mr. Do guilty of DWI. 3 R.R. at 90-92.

Class B misdemeanor. A Class B misdemeanor has a maximum punishment of confinement of 180 days.[130] A Class A misdemeanor has a maximum punishment of confinement of one year.[131] Thus, the judge's finding of a heightened alcohol concentration level exposed Mr. Do to a greater punishment that that authorized by the jury's guilty verdict.[132] This is a violation of the principles set out in *Apprendi.* The jury should have made any finding on the issue of a heightened alcohol concentration level.

If this Court reaches this issue, Mr. Do requests a holding that the trial court's finding of a heightened alcohol concentration level violates *Apprendi.* In line with such a holding, this case should be remanded to the trial court for a new punishment hearing. And this Court should direct the trial court to assess punishment as authorized for a Class B misdemeanor conviction.

[130] Tex. Penal Code § 12.22.
[131] Tex. Penal Code § 12.21.
[132] Indeed, Mr. Do was sentenced to one year in jail. The jury only found Mr. Do guilty of Class B DWI which has a maximum term of confinement of 180 days. Thus, Mr. Do was the recipient of an illegal sentence. An illegal sentence can be noticed and acted upon at any time. "A trial or appellate court which otherwise has jurisdiction over a criminal conviction may always notice and correct an illegal sentence." *Mizell v. State,* 119 S.W.3d 804, 806 (Tex. Crim. App. 2003).

Issue Number Five

In determining conditions of community supervision, a judge shall consider the extent to which the conditions impact the defendant's ability to meet financial obligations. Here, the trial judge imposed several financial obligations on Mr. Do as conditions of community supervision. Nothing in the record shows the trial judge considered Mr. Do's ability to pay these obligations. Is Mr. Do obligated to pay these financial assessments?

At the conclusion of the punishment phase of Mr. Do's trial, the trial judge made the following statement to Mr. Do:

> All right. The Court is going to sentence you to one year in the Harris County Jail probated for a period of 12 months. During that time, you'll undergo a TRAS assessment, follow all recommendations, you'll perform 16 hours of community service. You'll maintain an interlock device on your vehicle, and you'll pay a fine in the amount of $250.[133]

Other than the $250 fine, the trial judge never mentioned that Mr. Do would be required to make payments. Mr. Do could perhaps have assumed that the requirement to maintain an interlock device on his car would cost him money. But this was not explicated by the trial judge.

The terms of community supervision imposed upon Mr. Do explicitly required him to make the following payments:

(1) $60 monthly payment to HCCSCD[134] as a "supervision fee" for the duration of Mr. Do's community supervision;

(2) $10 monthly payment to HCCSCD to cover the expenses of drug testing for the duration of Mr. Do's community supervision;

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[133] 4 R.R. at 6.

[134] HCCSCD is an acronym for the Harris County Community Supervision and Corrections Department.

(3) $12.50 one-time payment to HCCSCD to obtain an Offender Identification Card;

(4) $100 one-time payment to HCCSCD for the expense of an HCCSCD assessment;

(5) $50 fee to Crime Stoppers of Houston;

(6) $250 fine and court costs[135] at the rate of $70 per month.[136]

Nothing in the record indicates that the trial judge ever considered Mr. Do's ability to make these payments. This is a problem.

Article 42A.301 of the Code of Criminal Procedure lists basic discretionary conditions of community supervision.[137] Subsection (a) of Article 42A.301 makes the following declaration:

> In determining the conditions, the judge shall consider the extent to which the conditions impact the defendant's . . . (2) ability to meet financial obligations.[138]

As one can see, the judge "shall" consider the defendant's ability to meet financial obligations. Thus, the judge is required to make this consideration in the course of determining appropriate conditions of community supervision.

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[135] The amount of court costs Mr. Do was required to pay is not entirely ascertainable. The bill of costs provided by the district clerk is only partially legible. *See* C.R. at 99. Every other line of the bill of costs is blackened out for some reason. *See id.* The costs that can be discerned total $247. *See id.*
[136] C.R. at 96-97.
[137] Tex. Code Crim. Proc. art. 42A.301.
[138] Tex. Code Crim. Proc. art. 42A.301(a) (emphasis added).

Article 42.15(a-1) of the Code of Criminal Procedure imposes a similar requirement:

> Notwithstanding any other provision of this article, during or immediately after imposing a sentence in a case in which the defendant entered a plea in open court as provided by Article 27.13, 27.14(a), or 27.16(a), a court shall inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs. If the court determines that the defendant does not have sufficient resources or income to immediately pay all or part of the fine and costs, the court shall determine whether the fine and costs should be:
>
> (1) subject to Subsection (c), required to be paid at some later date or in a specified portion at designated intervals;
>
> (2) discharged by performing community service under, as applicable, Article 43.09(f), Article 45.049, Article 45.0492, as added by Chapter 227 (HB 350), Acts of the 82nd Legislature, Regular Session, 2011, or Article 45.0492, as added by Chapter 777 (HB 1964), Acts of the 82nd Legislature, Regular Session 2011;
>
> (3) waived in full or in part under Article 43.091 or 45.0491; or
>
> (4) satisfied through any combination of methods under Subdivisions (1)-(3).[139]

The statute requires judges to "inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs."[140] Here, the trial court made no such inquiry.[141]

[139] Tex. Code Crim. Proc. Art. 42.15(a-1).
[140] *See id.*
[141] *See* 4 R.R. at 6.

The fact that the trial judge did not comply with either Article 42A.301(a) or 42.015(a-1) raises a question concerning the consequences of such noncompliance. Can the trial court's order to pay the fine, court costs, and other required charges stand? This appears to be a question of first impression.[142]

Mr. Do believes the statutory directive that trial courts inquire into and consider a defendant's ability to pay is an "absolute requirement." The term "absolute requirement" is a term of art describing one of three distinct sets of rights of Texas litigants. These three sets of rights were described in the major case of *Marin v. State.*[143] A brief review of the *Marin* case is in order here.

The 1993 Court of Criminal Appeals opinion in *Marin v. State* is a classic, oft-cited case.[144] In *Marin,* the Court recognized that "the rights of litigants in our [Texas] system of adjudication" are of three distinct types:

(1) absolute requirements and prohibitions;

(2) rights of litigants which must be implemented by the system unless expressly waived; and

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[142] Article 42.15(a-1) went into effect on September 1, 2017. Act of May 29, 2017, 85th Leg., R.S., ch. 1127, § 4, 2017 Tex. Gen. Law 4317, 4318. Undersigned counsel has not found any appellate cases interpreting subdivision (a-1). The language within Article 42A.301(a) requiring trial judges to consider the defendant's ability to meet financial obligations also became effective on September 1, 2017. Act of May 15, 2017, 85th Leg., R.S., ch. 109, § 1, 2017 Tex. Gen. Law 248. Undersigned counsel has not found any appellate cases interpreting this new statutory language either.

[143] *Marin v. State,* 851 S.W.2d 275 (Tex. Crim. App. 1993).

[144] The Court of Criminal Appeals has described *Marin* as the "watershed decision in the law of error-preservation." *Proenza v. State,* 541 S.W.3d 786, 792 (Tex. Crim. App. 2017) (quoting from *Saldano v. State,* 70 S.W.3d 873, 888 (Tex. Crim. App. 2002)). The *Marin* opinion was authored by Judge Lawrence Meyers.

(3) rights of litigants which are to be implemented upon request.[145]

Most rights are of the third variety – rights which are implemented only upon request.[146] For example, a defendant loses the right to have hearsay evidence excluded from his trial by failing to object to the introduction of that evidence.[147] "Unless a litigant exercises his option to exclude evidence it is to be admitted."[148]

The second category of rights – rights which must be implemented unless they are expressly waived – cannot be forfeited by inaction alone.[149] If a defendant wishes to relinquish one of these rights, he or she must do so expressly.[150]

The first category of rights – absolute requirements and prohibitions – cannot be waived by the parties.[151] The clearest case of such absolute requirements are laws affecting the jurisdiction of our courts.[152] "For example, a person may not be tried in a Texas for a felony offense by the County Court at Law, even if he consents."[153]

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[145] *Marin v. State,* 851 S.W.2d at 279.
[146] *Id.* at 278.
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.* at 278-79.
[151] *Id.*
[152] *Id.*
[153] *Id.* This statement is generally true because the Legislature has not given most statutory county courts jurisdiction to handle felony cases. Thus, subject-matter jurisdiction over felony cases is retained by the district courts. *See* Tex. Const. art. V, § 8 ("District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body."). But there is at least one exception to this general rule. The

It is actually inaccurate to refer to laws in this first category as "rights." The case of *Ieppert v. State*[154] makes this clear. *Ieppert* concerned *ex post facto* laws.[155] The Texas Constitution contains an absolute prohibition against *ex post facto* laws.[156] The United States Constitution contains a similarly-worded prohibition.[157] Writing for the Court of Criminal Appeals, Judge Meyers explained that the prohibition on *ex post facto* laws is actually not a "right" at all:

> The United States Constitution provides categorically that "[n]o ex post facto Law shall be passed." U.S. Const. art. I § 9 cl. 3. So does the Texas Constitution. Tex. Const. art. I § 16. It is clear, both from the plain language of these provisions and from the way in which this Court has implemented them in the past, that *ex post facto* prohibitions do not merely confer upon the people a waivable or forfeitable right not to have their conduct penalized retroactively. Indeed, the constitutional prohibition against *ex post facto* legislation is not really an individual right at all. It is a categorical prohibition directed by the people to their government. Short of a constitutional amendment, the people may not waive this prohibition, either individually or collectively, any more than they may consent to be imprisoned for conduct which does not constitute a crime.[158]

Legislature has given the County Court at Law of Panola County jurisdiction to hear felony cases. *See* Tex. Gov't Code § 25.1852 ("a county court at law in Panola County has concurrent jurisdiction with the district court").

[154] *Ieppert v. State,* 908 S.W.2d 217 (Tex. Crim. App. 1995).

[155] *See id.*

[156] *See* Tex. Const. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.").

[157] *See* U.S. Const. art. I, § 9, cl. 3.

[158] *Ieppert v. State*, 908 S.W.2d at 220 (emphasis added). Judge Meyers opinion for the majority in *Ieppert* came just over two years after his majority opinion in *Marin*. The *Ieppert* opinion makes it clear that the constitutional provisions prohibiting *ex post facto* laws create an absolute prohibition. Thus, these constitutional provisions belong in *Marin's* first category. *See id.* at 219-20.

Under the teachings of the Court of Criminal Appeals in *Marin,* an absolute requirement cannot be waived:

> Of course, the system also includes a number of requirements and prohibitions which are essentially independent of the litigants' wishes. Implementation of these requirements is not optional and cannot, therefore, be waived or forfeited by the parties.[159]

The *Marin* opinion also said:

> [A]bsolute requirements and prohibitions, like rights which are waivable only, are to be observed even without partisan request. But unlike waivable rights, they can't lawfully be avoided even with partisan consent. Accordingly, any party entitled to appeal is authorized to complain that an absolute requirement or prohibition was violated, and the merits of his complaint on appeal are not affected by the existence of a waiver or forfeiture at trial.[160]

The statutory language directing trial judges to perform ability-to-pay inquiries is phrased as an absolute requirement.[161] The language does not speak of a defendant possessing a right to have the judge make an ability-to-pay inquiry. It is an absolute requirement for trial judges to conduct ability-to-pay determinations. There is no indication that a defendant can somehow waive this requirement.

The Texas Office of Court Administration has published two bench cards in an attempt to provide information to judges about the new requirements. The first bench

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[159] *Marin v. State,* 851 S.W.2d at 279.
[160] *Id.* at 280.
[161] *See e.g.,* Tex. Code Crim. Proc. art. 42.15(a-1) ("a court shall inquire"); Tex. Code Crim. Proc. art. 42A.301(a) ("the court shall consider").

card is directed to the judges of district courts and county-level courts.[162] The second bench card is directed to the judges of justice courts and municipal courts.[163] The bench card for the judges of the district and county-level courts stresses that the law imposes a new requirement on judges:

> At the sentencing of a defendant who enters a plea in open court, when imposing a fine and costs the judge is required to inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs.[164]

Clearly, the Office of Court Administration sees Article 42.15(a-1) as imposing a requirement on the trial court to act. This is as opposed to a right of the defendant to ask for such a determination. Courts should be performing these ability-to-pay determinations without being asked. The requirement that courts perform the determinations is an absolute requirement.

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[162] Texas Office of Court Administration – *Bench Card for Judicial Processes Relating to the Collection of Fines and Costs – District and County Court Version—Applies to Jailable Offenses*. This bench card can be accessed online at www.txcourts.gov/media/1440389/sb-1913-district-county-court.pdf.

[163] Texas Office of Court Administration – *Bench Card for Judicial Processes Relating to the Collection of Fines and Costs – Justice and Municipal Court Version—Applies to Fine-Only Offenses*. This bench card can be accessed online at www.txcourts.gov/media/1440393/sb-1913-justice-municipal.pdf.

[164] Texas Office of Court Administration – *Bench Card for Judicial Processes Relating to the Collection of Fines and Costs – District and County Court Version—Applies to Jailable Offenses* (OCA emphasizes the underlined portion of the statement by putting that portion in red type).

Article 42.15(a-1) was passed by the Legislature in 2017 as part of Senate Bill 1913.[165] The Senate Research Center's "Bill Analysis" describes new subsection (a-1) as follows:

> (a-1) Requires a court, notwithstanding any other provision of this article (Fines and Costs), during or immediately after imposing a sentence in a case in which the defendant entered a plea in open court as provided by certain articles, to inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs. Requires the court, if the court determines that the defendant does not have sufficient resources or income to immediately pay all or part of the fine and costs, to determine whether the fine and costs should be paid, discharged, waived, or satisfied in certain matters.[166]

The foregoing bill analysis further reinforces the idea that trial judges are required to perform an ability-to-pay inquiry. There is no indication whatsoever that a judge can decline to perform an inquiry even if the defendant agrees that such an inquiry is unnecessary. And there is certainly no indication that a defendant waives the right to have the judge conduct an ability-to-pay inquiry through inaction.

This issue (Issue Five) will not be reached if this Court acts favorably on Issues One and Two. But if this Court rejects Issues One and Two, then this issue should be evaluated. Mr. Do requests that this Court grant relief in regard to Issue Five.

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[165] Act of May 29, 2017, 85th Leg., R.S., ch. 1127, § 4, 2017 Tex. Gen. Law 4317, 4318. Senate Bill 1913 was authored by Senator Judith Zaffirini.

[166] Act of May 29, 2017, 85th Leg., R.S., ch. 1127, § 4, 2017 Tex. Gen. Law 4317, 4318, Senate Committee on Criminal Justice, Bill Analysis, Tex. S.B. 1913, 85th Leg., R.S., (2017)(emphasis added). *See* https://capitol.texas.gov/tlodocs/85R/analysis/pdf/SB01913F.pdf#navpanes=0.

Specifically, Mr. Do asks this Court to remand the case to the trial court so the judge may perform the statutorily-required ability-to-pay inquiry.

PRAYER

Mr. Do respectfully prays that this this Court sustain Issue Number One and dismiss the prosecution against him.

Should this Court overrule Issue Number One, Mr. Do requests that this Court sustain Issue Number Two and dismiss the prosecution against him.

If Issues One and Two are both overruled, Mr. Do prays that this Court grant Issue Number Three. Mr. Do requests that this Court reverse his judgment of conviction for a Class A misdemeanor. He further requests that this Court remand the case to the trial court with instructions to reform the judgment. Specifically, Mr. Do requests that the court be instructed to reform the judgment to reflect a conviction for regular Class B misdemeanor DWI. Additionally, Mr. Do requests that this Court instruct the trial court to conduct a new punishment hearing. The new punishment hearing should be for a conviction for the offense of Class B misdemeanor DWI.

If Issues One, Two, and Three are overruled, Mr. Do requests that this Court grant relief in connection with Issue Number Four. Specifically, Mr. Do prays that this Court reverse his judgment of conviction for a Class A misdemeanor. He further requests that this Court remand the case to the trial court with instructions to reform the judgment. Specifically, Mr. Do requests that the court be instructed to reform the judgment to reflect a conviction for regular Class B misdemeanor DWI. Additionally,

Mr. Do requests that this Court instruct the trial court to conduct a new punishment hearing. The new punishment hearing should be for a conviction for the offense of Class B misdemeanor DWI.

If this Court overrules Issues One and Two, Mr. Do prays that this Court grant relief in connection with Issue Number Five. Specifically, Mr. Do asks this Court to remand the case to the trial court so the judge may perform the statutorily-required ability-to-pay determination. This request is made regardless of how this Court rules on Issues Three and Four.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 11, 2019, I provided this brief to the Harris County District Attorney via the EFILETEXAS.gov e-filing system. This certification is required by Texas Rule of Appellate Procedure 9.5.

/s/ Ted Wood
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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief contains 11,936 words. This word-count is calculated by the Microsoft Word program used to prepare this brief. The word-count does not include those portions of the brief exempted from the word-count requirement under Texas Rule of Appellate Procedure 9.4(i)(1). The number of words permitted for this type of computer-generated brief (a brief in an appellate court) is 15,000. Tex. R. App. P. 9.4(i)(2)(B).

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